

# DISPUTE RESOLUTION AND CONSTRUCTION AND ENGINEERING

# ALERT



## SPECIAL EDITION ALERT: NEC4

### NEC4: A STEP UP FROM THE NEC3?

With time, it becomes necessary for construction and engineering contracts to be updated. This alert identifies the differences in the latest iteration of the NEC: the NEC4.

### ADVANCE NOTICE OF THE DISPUTE RESOLUTION PROVISIONS UNDER THE NEW NEC4 SUITE OF CONTRACTS

On 22 June 2017 NEC4, the next generation of the NEC Suite of Standard Form Contracts, including the widely used Engineering and Construction Contract, will be released, updating the current NEC3 Suite of Contracts which has, aside from some minor modifications, been around since 2005.

# NEC4: A STEP UP FROM THE NEC3?

*The NEC4 introduces two additional contracts. Firstly, an Alliance Contract which assists parties to achieve assimilation in segmented projects. Secondly, a Design, Build and Operate contract which recognises the need for a cradle-to-grave engineering and construction contract.*

*The NEC4 also brings about amendments to certain terms contained in the NEC, creating harmony between the NEC contracts.*



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The NEC4 introduces two additional contracts. Firstly, an Alliance Contract which assists parties to achieve assimilation in segmented projects. Secondly, a Design, Build and Operate contract which recognises the need for a cradle-to-grave engineering and construction contract, where works need to be built, operated and maintained.

The NEC4 also brings about amendments to certain terms contained in the NEC, creating harmony between the NEC contracts. For work to be provided, the term 'Scope' has replaced the terms 'Works Information', 'Service Information' and 'Goods Information'. In terms of construction security, the NEC4 recognises that it is not always the parent company that issues security on behalf of a contracting party. Consequently, the NEC4 amends the nomenclature of secondary option X4 from 'Parent company guarantee' to 'Ultimate holding company guarantee'. Also to be noted from a security perspective is the introduction of a new secondary option clause which relates to the type of undertaking often described as 'collateral warranties'.

In terms of clause 31.3 of the NEC3, the contractor is required to submit a programme to the project manager for acceptance within two weeks of receipt. The clause does not make provision for the circumstance where no response is received from the project manager in respect of the submitted programme. Remedyng the uncertainty, the NEC4 provides a deeming provision to the effect that the programme submitted by the contractor shall become the Accepted Programme if the project manager fails to respond within the time period.

The contractor is now able to make suggestions and proposals to the project manager by way of an amendment to the Scope. Under the NEC4, the contractor may propose acceleration to obtain Completion at a date prior to the scheduled Completion Date. Such proposal is subject to the project manager's approval. This differs from clause 36 of the NEC3, where acceleration can only be proposed by the project manager.

The NEC3 perhaps fell short in protecting the intellectual property rights of the owner of proprietary technology. There are provisions in the NEC4 affording such protection, as well as providing the manner in which intellectual property may be used.

# NEC4: A STEP UP FROM THE NEC3?

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*The NEC4 is a welcomed update to the NEC3 suite of contracts. It is important that all contracting parties inform themselves of the differences between the NEC3 and NEC4.*



A new core clause has been added to the NEC4 stating that a termination right may be triggered should a party to the agreement commit acts of bribery and corruption.

Lastly, the NEC4 contains an additional compensation event to those already denoted in clause 60.1 of the NEC3, namely where a quotation issued by the contractor at the request of the project manager is rejected by the project manager. In such an instance, the contractor has a claim against the project manager for the costs it incurred in preparing the quotation.

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*Jurg van Dyk, Muhammed Somrey and Jason Gouveia*



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# ADVANCE NOTICE OF THE DISPUTE RESOLUTION PROVISIONS UNDER THE NEW NEC4 SUITE OF CONTRACTS

*NEC4 will bring about a raft of changes as well as introduce two new contracts, the NEC4 Design Build Operate Contract (DBO) and the NEC4 Alliance Contract (ALC).*

*The introduction of these provisions should facilitate a more efficient process of dispute avoidance and resolution for NEC4 users.*



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One of the key changes which will be introduced by NEC4 relates to the dispute resolution provisions contained in option W1 of NEC3 (which provides for a two-stage dispute resolution mechanism of adjudication followed by arbitration) and option W2 (used in the United Kingdom when the Housing, Grants, Construction and Regeneration Act 1996 applies).

NEC4 will introduce provisions aimed at the avoidance of disputes and a more consensual approach to dispute resolution in line with the theme of the NEC which requires the parties to act in a spirit of mutual trust and co-operation.

NEC4 will introduce a mandatory provision in option W1 (consensual in option W2), which requires designated senior representatives of each party to meet (over a period of four weeks) and try to reach a negotiated resolution of a dispute before any formal dispute resolution proceedings commence.

NEC4 will also introduce a new option W3, which provides for the appointment of a Dispute Avoidance Board by the parties at

the time when the contract is concluded.

The Dispute Avoidance Board (which could comprise one or three members) will become familiar with the project from an early stage by making visits to the project site at regular intervals or when requested by the parties, and in the event of a dispute arising will meet with the parties in order to try to find a solution. If the dispute is not resolved during this process, the Dispute Avoidance Board will provide its recommendations (which will not be binding) to the parties on how to resolve the dispute.

Only in the event of the parties not accepting these recommendations, may the dispute be referred to the tribunal (either litigation in court or arbitration - the Dispute Avoidance option makes no provision for adjudication).

The standard NEC3 Adjudicator's Contract will also be changed to provide for the use of option W3 and will be renamed the Dispute Resolution Service Contract.

The introduction of these provisions should facilitate a more efficient process of dispute avoidance and resolution for NEC4 users.

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### BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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